

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF(PJC)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S MOTION TO COMPEL SIMMONS' FOODS, INC.'S  
TO RESPOND TO DISCOVERY SEEKING FINANCIAL INFORMATION**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully move to compel Simmons' Foods, Inc. ("Simmons") to respond to discovery regarding its financial information.<sup>1</sup>

**I. Introduction**

In the Second Amended Complaint, the State specifically seeks relief in the form of "[p]unitive and exemplary damages, to the maximum extent allowed under the law." DKT #1215, p. 35. "Financial condition" of a defendant is an element of analysis in awarding punitive damages. *See* 23 Okla. Stat. § 9.1. On July 10, 2006, the State served discovery seeking information regarding Simmons' financial condition. To date, Simmons has produced only balance sheets, but none of the additional financial information the State requested, all of which

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<sup>1</sup> Pursuant to LCvR 37.1, counsel have met and conferred on the issues set forth in this motion, but have been unable to reach an agreement.

is relevant to Simmons' financial condition. The State is entitled to production of the requested information.

## **II. Factual Background**

In its July 10, 2006 requests for production, the State requested information regarding Simmons' net worth, and Simmons objected to this request, claiming the information was irrelevant and confidential.

**Request for Production #107:** Please produce all documents and materials reflecting, referring to or relating to your net worth.

**Answer:** Simmons objects to this request for production on the grounds that it seeks information which is not relevant to any issue in the lawsuit. Further, Simmons objects on the grounds that it seeks confidential business information. Simmons is not a public company, but instead is a closely held family corporation. As such, its financial records are private and confidential.

Ex. A. In its supplemental responses to the July 10, 2006 requests for production, Simmons altered its response to Request #107 by slightly changing the wording in the its response as follows:

**Answer:** Simmons objects to this request for production on the grounds that it seeks information which is not relevant to any issue in the lawsuit. Further, Simmons objects on the grounds that it seeks confidential business information. Simmons is a privately owned family corporation; its records are not subject to public disclosure.

Ex. B. The State served another request for production regarding Simmons' financial condition in its September 13, 2008 Requests for Production, and Simmons again objected and failed to produce any responsive information.

**Request for Production #11:** To the extent you have not already produced them, please produce copies of documents reflecting your financial statements for fiscal years 2002 to the present, as well as any other documents reflecting your net worth for fiscal years 2002 to the present. For purposes of this request for production, the term "financial statement" includes, but is not necessarily limited to, balance sheets, statements of income, statements of equity position, statements of cash flow, and all footnotes.

**Response:** Simmons objects to Request for Production No. 11 on the grounds that it seeks information that is not relevant and instead is intended to harass and oppress. Simmons is a privately owned, closely-held family corporation and considers its financial records to [sic] confidential. Simmons further objects to this Request for Production because it is duplicative of Request No. 107 of Plaintiff's July 10, 2006 Requests for Production.

Ex. C.

In its continued effort to obtain responsive documents, in a letter dated October 24, 2008, the State provided Simmons with a list of seven specific types of financial documents it was seeking in regard to these two discovery requests. *See* Ex. D. On November, 4, 2008, counsel for Simmons and the State met and conferred regarding these discovery requests and the State's October 24, 2008 letter. Counsel for the State again articulated the information sought in the discovery requests, and counsel for Simmons said she needed to confer with her client. On November 17, 2008, Simmons agreed to produce balance sheets that would include sufficient information regarding assets, liabilities and equities to create a full understanding of Simmons' financial condition and the parties agreed that the State would accept these documents and advise counsel for Simmons if additional information was needed. *See* Ex. E, (Nov. 17, 2008 email exchange between Bronson and Xidis). On December 8, 2008, *almost two weeks after the date the parties agreed upon for production of the information*, Simmons finally produced some, but not all, of the financial information it agreed to produce. The information it did agree to produce was extremely limited. Simmons produced only balance sheets; it did not produce complete financial statements. Furthermore, the balance sheets produced state that "[t]he accompanying notes are an integral part of these combined financial statements." However, the "integral" notes were not produced with the balance sheets. On December 10, 2008, counsel for the State wrote Simmons' counsel regarding the insufficiency of the production. Specifically, the State

requested complete financial statements, which would include income information, cash flow information, and the notes that are an integral part of the balance sheets. *See* Ex. F (Xidis 12/10/08 email to Bronson). Again, on Wednesday, November 14, 2009, counsel for the State again corresponded with Simmons' counsel regarding its requests. *See* Ex. G (Xidis 1/14/2009 email to Bronson). To date, Simmons has failed to respond to this request.

### **III. Argument**

The discovery regarding Simmons net worth and corresponding financial documents is relevant to the State's claim for punitive damages, and Simmons' objections are without merit. In its written responses to this discovery, Simmons objected to the State's discovery regarding its financial condition on the claim that this information is irrelevant. This assertion is baseless. One of the seven factors for a jury to consider in evaluating punitive damages under Oklahoma law is "[t]he financial condition of the defendant." *See* 23 Okla. Stat. § 9.1. This Court has repeatedly held that discovery regarding a defendant's financial condition and net worth is appropriate when a claim for punitive damages has been made. *See, e.g., Hightower v. Heritage Academy of Tulsa, Inc.*, 2008 WL 2937227 (N.D. Okla. July 29, 2008) ("Financial records are discoverable when punitive damages are at issue"); *American Benefit Life Ins. Co. v. Ille*, 87 F.R.D. 540, 542 (N.D. Okla. 1978) ("It is well settled in Oklahoma that in an action wherein punitive damages are proper, evidence of the financial worth of the defendant is competent and admissible."). In the *City of Tulsa* case, this Court held that "[i]t would appear that *financial statements* reflecting the Defendants' net worth from 1996 forward would be sufficient for the Plaintiffs' needs. . . . This order is without prejudice to Plaintiffs' re-urging the motion *should additional financial information be necessary* as the case progresses." *See* Ex. H, p. 6 (emphasis added).

The full financial statements that the State has repeatedly requested, including information on income and cash flow, and the notes that are “integral” to the financial statements, are obviously relevant evidence regarding Simmons’ financial condition, a key element in the punitive damages analysis. Moreover, recent tax returns are also relevant to this analysis in that they are the data used and relied upon to prepare the financial statements and contain additional information that demonstrate how certain debt obligations are treated among related entities and also contain information about how smaller private entities, such as Simmons, distribute profits. *See* Ex. I, ¶¶ 10-11.

The State’s expert who will testify about the financial conditions of the defendants, David Payne, drafted reports providing as much analysis as possible with the limited information produced thus far by Simmons, and that report was timely disclosed to Simmons on January 5, 2009. However, as explained in his report on Simmons, and his attached affidavit, the information requested by the State is important and relevant information for a fuller analysis. *See* Ex. J [Payne Report]<sup>2</sup> and I. As Mr. Payne explains in his affidavit, “GAAP [financial] Statements, Footnote Disclosures, Consolidating Data and Tax Data are . . . relevant to evaluating the financial condition, net worth and/or Ability to Pay of the Defendants.” *See* Ex. I, ¶ 10. Although the balance sheets produced by Simmons contain some limited information about net worth (but not the integral notes to accompany these numbers), they do not include important information about Simmons’ income or cash flow. The income and cash flow of a defendant are important elements to understanding the true nature of a company’s financial condition. As Mr. Payne explains in his affidavit, “[t]he starting point for assessing the Financial

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<sup>2</sup> Because of the confidential nature of the information contained in the report, a copy of this exhibit will be provided to the Court under separate cover for an *in camera* review pursuant to Paragraph 6 of the Confidentiality Order (DKT# 985).

Attributes affecting financial condition involves an evaluation of data as reported by the Defendants' in their books, records, and financial statements ("Book Values"). Ability to Pay also considers true economic or intrinsic value ("Economic Value"), normalized earnings, and discretionary cash flows ("Earning Capacity") under the control of the managements for the Defendants." *See* Ex. I, ¶ 4. With only a balance sheet, a company's net worth is stated, but net worth alone is not necessarily a full picture of a company's financial condition. The level of a company's income is an important element of whether there is real or intrinsic value above the book value stated in a balance sheet. Moreover, complete tax returns also provide information relevant to evaluating financial condition by showing how a company treats debt obligations and distributes income. *See, e.g.,* Ex. I, ¶¶ 10-11.

While several years ago one might have argued that production of anything more than a current balance sheet is not relevant to the evaluation of a company's financial condition, the playing field has been altered by today's economy. A balance sheet is nothing more than a snapshot in time of a company's net worth on a given day. In today's volatile economy, the net worth of a company can fluctuate considerably in a very short period of time. Therefore, a more in-depth analysis is needed to determine a full picture of financial condition of any given company. The State cannot imagine that Simmons or any other defendant in this matter would want anything but the most thorough and up-to-date analysis of their financial conditions presented to the jury.

Complete financial statements should be readily available for Simmons. As Mr. Payne explains, "[b]ased upon my training and experience with privately held companies [like Simmons] GAAP Statements and Footnote Disclosures are generally prepared and are available

in the ordinary course of business due to Stakeholder Requirements.” *See* Ex. I, ¶ 8. Likewise, complete tax returns for the last two years should also be readily available.

Simmons’ objections regarding confidentiality of the requested materials are also without merit. This argument ignores the November 2006 confidentiality order the Court entered in this case that provides protection for sensitive business information. *See* DKT # 985. The confidentiality order provided methods for protecting confidential business information. Specifically, the order provides for a "Confidential" designation that protects designated documents from disclosure to third parties except for preparation of the case, and a "Confidential: Attorneys' Eyes Only" designation that protects designated information from disclosure to third parties as well as a further level of protection for Defendants from each other, since they are competitors in the same industry. *See* DKT# 985, pp. 2-6. The confidentiality order provides more than adequate protection for the relevant information the State is requesting about the Simmons’ financial condition. Simmons is clearly aware of this protection, having marked the few documents it did produce with confidentiality designations.

With Simmons having no valid objections to the requested discovery, the State requests that the Court order Simmons to provide the following documents that are responsive to the State’s requests for production: Complete financial statements, including information about income and cash flow for calendar years ending in 2003-2008 and all corresponding notes for these financial statements, and complete filed tax returns for 2006 and 2007 (including all supporting schedules, disclosures, and detailed appreciation schedules).

#### **IV. Conclusion**

For the reasons stated herein, the Court should order Simmons to respond to the State’s requests for information pertaining to its financial condition and to provide the specific

documents delineated herein. Because this information is readily available to Simmons and these requests have been outstanding for a very long time, the State requests that Simmons be requested to produce these materials immediately. The State's expert, David Payne, will need to review these documents upon receipt of them from Simmons the State anticipates it will be requesting leave to supplement Mr. Payne's expert report once he has had an opportunity to review this information.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
 ATTORNEY GENERAL  
 Kelly H. Burch OBA #17067  
 J. Trevor Hammons OBA #20234  
 Daniel P. Lennington OBA #21577  
 ASSISTANT ATTORNEYS GENERAL  
 State of Oklahoma  
 313 N.E. 21<sup>st</sup> St.  
 Oklahoma City, OK 73105  
 (405) 521-3921

/s/ Richard T. Garren

M. David Riggs OBA #7583  
 Joseph P. Lennart OBA #5371  
 Richard T. Garren OBA #3253  
 Sharon K. Weaver OBA #19010  
 Robert A. Nance OBA #6581  
 D. Sharon Gentry OBA #15641  
 David P. Page OBA #6852  
 RIGGS, ABNEY, NEAL, TURPEN,  
 ORBISON & LEWIS  
 502 West Sixth Street  
 Tulsa, OK 74119  
 (918) 587-3161

Louis W. Bullock OBA #1305  
 Robert M. Blakemore OBA 18656  
 BULLOCK, BULLOCK & BLAKEMORE  
 110 West Seventh Street Suite 707  
 Tulsa OK 74119  
 (918) 584-2001



Frederick C. Baker  
 (admitted *pro hac vice*)  
 Lee M. Heath  
 (admitted *pro hac vice*)  
 Elizabeth C. Ward  
 (admitted *pro hac vice*)  
 Elizabeth Claire Xidis  
 (admitted *pro hac vice*)  
 MOTLEY RICE, LLC  
 28 Bridgeside Boulevard  
 Mount Pleasant, SC 29465  
 (843) 216-9280

William H. Narwold  
 (admitted *pro hac vice*)  
 Ingrid L. Moll  
 (admitted *pro hac vice*)  
 MOTLEY RICE, LLC  
 20 Church Street, 17<sup>th</sup> Floor  
 Hartford, CT 06103  
 (860) 882-1676

Jonathan D. Orent  
 (admitted *pro hac vice*)  
 Michael G. Rousseau  
 (admitted *pro hac vice*)  
 Fidelma L. Fitzpatrick  
 (admitted *pro hac vice*)  
 MOTLEY RICE, LLC  
 321 South Main Street  
 Providence, RI 02940  
 (401) 457-7700

Attorneys for the State of Oklahoma

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of February, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
David P. Page	dpage@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	
Louis Werner Bullock	lbullock@bullock-blakemore.com
Robert M. Blakemore	bblakemore@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	
Frederick C. Baker	fbaker@motleyrice.com
Lee M. Heath	lheath@motleyrice.com
Elizabeth C. Ward	lward@motleyrice.com
Elizabeth Claire Xidis	cxidis@motleyrice.com
William H. Narwold	bnarwold@motleyrice.com
Ingrid L. Moll	imoll@motleyrice.com
Jonathan D. Orent	jorent@motleyrice.com
Michael G. Rousseau	mrousseau@motleyrice.com
Fidelma L. Fitzpatrick	ffitzpatrick@motleyrice.com
MOTLEY RICE, LLC	
<b><u>Counsel for State of Oklahoma</u></b>	
Robert P. Redemann	rredemann@pmrlaw.net
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.	
David C. Senger	david@cgmlawok.com
Robert E Sanders	rsanders@youngwilliams.com
Edwin Stephen Williams	steve.williams@youngwilliams.com
YOUNG WILLIAMS P.A.	
<b><u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u></b>	
John H. Tucker	jtucker@rhodesokla.com
Theresa Noble Hill	thill@rhodesokla.com
Colin Hampton Tucker	ctucker@rhodesokla.com
Leslie Jane Southerland	ljsoutherland@rhodesokla.com
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry Wayen West	terry@thewestlawfirm.com
THE WEST LAW FIRM	

Delmar R. Ehrich	dehrich@faegre.com
Bruce Jones	bjones@faegre.com
Krisann C. Kleibacker Lee	kklee@faegre.com
Todd P. Walker	twalker@faegre.com
Christopher H. Dolan	cdolan@faegre.com
Melissa C. Collins	mcollins@faegre.com
FAEGRE & BENSON, LLP	
Dara D. Mann	dmann@mckennalong.com
MCKENNA, LONG & ALDRIDGE LLP	
<b><u>Counsel for Cargill, Inc. &amp; Cargill Turkey Production, LLC</u></b>	
James Martin Graves	jgraves@bassettlawfirm.com
Gary V Weeks	gweeks@bassettlawfirm.com
Woody Bassett	wbassett@bassettlawfirm.com
K. C. Dupps Tucker	kctucker@bassettlawfirm.com
BASSETT LAW FIRM	
George W. Owens	gwo@owenslawfirmmpc.com
Randall E. Rose	rer@owenslawfirmmpc.com
OWENS LAW FIRM, P.C.	
<b><u>Counsel for George's Inc. &amp; George's Farms, Inc.</u></b>	
A. Scott McDaniel	smcdaniel@mhla-law.com
Nicole Longwell	nlongwell@mhla-law.com
Philip Hixon	phixon@mhla-law.com
Craig A. Merkes	cmerkes@mhla-law.com
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC	
Sherry P. Bartley	sbartley@mwsgw.com
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b><u>Counsel for Peterson Farms, Inc.</u></b>	
John Elrod	jelrod@cwlaw.com
Vicki Bronson	vbronson@cwlaw.com
P. Joshua Wisley	jwisley@cwlaw.com
Bruce W. Freeman	bfreeman@cwlaw.com
D. Richard Funk	rfunk@cwlaw.com
CONNER & WINTERS, LLP	
<b><u>Counsel for Simmons Foods, Inc.</u></b>	

Stephen L. Jantzen	sjantzen@ryanwhaley.com
Paula M. Buchwald	pbuchwald@ryanwhaley.com
Patrick M. Ryan	pryan@ryanwhaley.com
RYAN, WHALEY, COLDIRON & SHANDY, P.C.	
Mark D. Hopson	mhopson@sidley.com
Jay Thomas Jorgensen	jjorgensen@sidley.com
Timothy K. Webster	twebster@sidley.com
Thomas C. Green	tcgreen@sidley.com
Gordon D. Todd	gtodd@sidley.com
SIDLEY, AUSTIN, BROWN & WOOD LLP	
Robert W. George	robert.george@tyson.com
L. Bryan Burns	bryan.burns@tyson.com
TYSON FOODS, INC	
Michael R. Bond	michael.bond@kutakrock.com
Erin W. Thompson	erin.thompson@kutakrock.com
Dustin R. Darst	dustin.darst@kutakrock.com
KUTAK ROCK, LLP	
<b><u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., &amp; Cobb-Vantress, Inc.</u></b>	
R. Thomas Lay	rtl@kiralaw.com
KERR, IRVINE, RHODES & ABLES	
Frank M. Evans, III	fevans@lathropgage.com
Jennifer Stockton Griffin	jgriffin@lathropgage.com
David Gregory Brown	
LATHROP & GAGE LC	
<b><u>Counsel for Willow Brook Foods, Inc.</u></b>	
Robin S Conrad	rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CENTER	
Gary S Chilton	gchilton@hcdattorneys.com
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b><u>Counsel for US Chamber of Commerce and American Tort Reform Association</u></b>	
D. Kenyon Williams, Jr.	kwilliams@hallestill.com
Michael D. Graves	mgraves@hallestill.com
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b><u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u></b>	

Richard Ford	richard.ford@crowedunlevy.com
LeAnne Burnett	leanne.burnett@crowedunlevy.com
CROWE & DUNLEVY	
<b><u>Counsel for Oklahoma Farm Bureau, Inc.</u></b>	
Kendra Akin Jones, Assistant Attorney General	Kendra.Jones@arkansasag.gov
Charles L. Moulton, Sr Assistant Attorney General	Charles.Moulton@arkansasag.gov
<b><u>Counsel for State of Arkansas and Arkansas National Resources Commission</u></b>	
Mark Richard Mullins	richard.mullins@mcafeetaft.com
MCAFEE & TAFT	
<b><u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u></b>	
Mia Vahlberg	mvahlberg@gablelaw.com
GABLE GOTWALS	
James T. Banks	jtbanks@hhlaw.com
Adam J. Siegel	ajsiegel@hhlaw.com
HOGAN & HARTSON, LLP	
<b><u>Counsel for National Chicken Council; U.S. Poultry and Egg Association &amp; National Turkey Federation</u></b>	
John D. Russell	jrussell@fellerssnider.com
FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC	
William A. Waddell, Jr.	waddell@fec.net
David E. Choate	dchoate@fec.net
FRIDAY, ELDREDGE & CLARK, LLP	
<b><u>Counsel for Arkansas Farm Bureau Federation</u></b>	
Barry Greg Reynolds	reynolds@titushillis.com
Jessica E. Rainey	jrainey@titushillis.com
TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON	
Nikaa Baugh Jordan	njordan@lightfootlaw.com

William S. Cox, III	wcox@lightfootlaw.com
LIGHTFOOT, FRANKLIN & WHITE, LLC	
<b><u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u></b>	

Also on this 17th day of February, 2009 I mailed a copy of the above and foregoing pleading to:

**David Gregory Brown**  
Lathrop & Gage LC  
314 E HIGH ST  
JEFFERSON CITY, MO 65101

**Thomas C Green**  
Sidley Austin Brown & Wood LLP  
1501 K ST NW  
WASHINGTON, DC 20005

**Dustin McDaniel**  
**Justin Allen**  
Office of the Attorney General (Little Rock)  
323 Center St, Ste 200  
Little Rock, AR 72201-2610

**Steven B. Randall**  
58185 County Road 658  
Kansas, Ok 74347

**Cary Silverman**  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)  
600 14TH ST NW STE 800  
WASHINGTON, DC 20005-2004

**George R. Stubblefield**  
HC 66, Box 19-12  
Proctor, Ok 74457

Secretary of the Environment  
State of Oklahoma  
3800 NORTH CLASSEN  
OKLAHOMA CITY, OK 73118

/s/ Richard T. Garren \_\_\_\_\_